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IN THE

Supreme Court of the United States

October Term, 1948.

No. 605 MISC.

PETE FIAMENGO and NICK MARINKOVICH,

Petitioners,

vs.

THE AMERICAN FISHING VESSEL "SAN FRANCISCO" and ANDREW ZAMBERLIN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Pete Fiamengo and Nick Marinkovich, fishermen seamen, for a Writ of Certiorari to review the decree of the Court of Appeals for the Ninth Circuit, entered on the 15th day of February, 1949, affirming a judgment in favor of the respondents in an action for wages and maintenance because of their alleged wrongful discharge, entered November 27, 1947, by the District Court of the United States for the Southern District of California, Central Division, respectfully shows:

Summary Statement of the Matter Involved.

Petitioners were employed as fishermen seamen, on board the American Fishing Vessel "SAN FRANCISCO," for the tuna fishing season of 1947, out of the port of Los Angeles, State of California, which commenced the early part of the year of 1947, and terminated in July of the same year. [Vol. I, R. 4, 5.] The petitioners were on board the D/S "SAN FRANCISCO" during two trips made by this vessel from the port of Los Angeles, California, to areas off the coast of Mexico. Approximately 16 days after the D/S "SAN FRANCISCO" had returned from its second trip, during a portion of which period said vessel was in a shipyard for repairs, petitioners were discharged April 22, 1947, without any reason given therefor. On July 3, 1947, petitioner filed their libel against the D/S "SAN FRANCISCO" and her owners for wages and maintenance. [Vol. I, R. 3.] On August 4, 1947, the claimants of said vessel filed their answer and claim in said action, and therein, for the first time, asserted that the petitioners were discharged for their disobedience of an order of Andrew Zamberlin, the "fish boss" aboard the D/S "SAN FRANCISCO."

When the D/S "SAN FRANCISCO" was in Navidad Bay, Mexico, on an evening in the early part or middle of March, 1947, most of the members of the crew of said vessel, together with some crew members of the "ST. JAMES," another tuna boat also in Navidad Bay, went ashore to a small village to spend a few hours chatting and having some beer at the only Cantina. [Vol. II, R. 42, 110.]

About 11 o'clock in the evening, these relaxing crew members of the "ST. JAMES" and "SAN FRANCISCO" left

the Cantina to return to their vessels by a skiff that was on the shore about 200 feet from the Cantina. [Vol. II, R. 11, 22, 30, 35, 49 and 161.]

The D/S "SAN FRANCISCO" was anchored within voice or whistling distance from the shore. [Vol. II, R. 176.] Petitioners requested permission of the master of the D/S "SAN FRANCISCO" to remain ashore until the following morning. [Vol. II, R. 18, 20, 25, 26, 61, 62, 88, 111, 132.]

Petitioners were advised by the master "That is all right if it is all right with my father. I don't care."

> "Q. What did they say? A. They said 'All right.'" [Vol. II, R. 132.]

It does not appear that permission was asked of the father of the master, but the record is clear that the master and his father knew that petitioners were remaining ashore and made no objection thereto. [Vol. II, R. 135, 161.]

Petitioners left the Cantina before 4 o'clock in the morning and were aboard the D/S "SAN FRANCISCO" before 5 o'clock a. m. [Vol. II, R. 111, 112, 5, 17, 19, 62.]

All of the crew of the D/S "SAN FRANCISCO", except the watch, were asleep when petitioners returned. [Vol. II, R. 6, 11, 12, 33, 40, 49, 53, 54, 63, 90, 139, 140, 165.]

The fish boss testified that he got up when the petitioners came aboard. [Vol. II, R. 165.]

After the petitioners had breakfast the fish boss, father of the master came down for coffee. [Vol. II, R. 7, 112.]

Later the fish boss requested petitioners and another member of the crew to pick up the skiff in preparation for leaving the harbor. [Vol. II, R. 112, 162, 165.]

The vessel left the harbor around 6 o'clock a. m. [Vol. II, R. 8, 19, 37, 38, 79.]

On Easter Sunday, approximately 3 or 4 weeks later, the D/S. "SAN FRANCISCO" returned to San Pedro, California, with a full load of tuna. [Vol. II, R. 113, 171, 172.] (The calendar indicates Easter Sunday as 6th April, 1947.)

After the fish were unloaded, the vessel was laid up for repairs. During this period the master and his father went to San Francisco and returned 10 or 12 days later. [Vol. II, R. 67, 114, 115, 170.] Before leaving they told petitioners they would be advised by them when they returned from San Francisco as to the sailing date. [Vol. II, R. 92, 113, 114.]

On April 22nd, 1948, petitioners were discharged as members of the crew of the D/S "SAN FRANCISCO" by Andrew Zamberlin with the permission of his son, the master of the vessel. [Vol. II, R. 93, 94, 116, 117, 134, 170.] No reason for the discharge was given other than the fish boss did not want them. [Vol. II, R. 67, 68, 93, 95, 116.]

Although diligent in their search, petitioners found no employment until approximately July 7, 1947. [Vol. II, R. 68, 69, 82, 84, 85, 120, 121.] Between 23rd April and 7th July, 1947, the share of each crew member of the D/S "SAN FRANCISCO" was $2632.65. [Vol. II, R. 83.] Upon these facts, the District Court held the discharge of petitioners was not wrongful and they were not entitled to recover their share or maintenance during the period of their unemployment by reason of said discharge. This judgment was sustained by the 9th Circuit Court of Appeals.

The Basis of the Court's Jurisdiction.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended, Title 28, U. S. C. A. Sec. 347(a).

The date of the judgment sought to be reviewed is February 15, 1949.

Question Presented.

(1) Was there a correct interpretation and application of the law by the Court of Appeals in holding "Upon the facts found, we conclude, as the District Court, that appellants were not wrongfully discharged but were discharged for good cause."

Reasons Relied Upon for the Allowance of the Writ.

(1) The decision of the Court of Appeals for the 9th Circuit in this case on the question of good cause for the separation of the seamen from their vessel is in conflict with the applicable decisions of the same Circuit in *Rogers v. Pacific-Atlantic S. S. Company,* 170 F. 2d 30, and in direct conflict with the decisions of the Federal Courts in the following cases:

Meyers v. Yosemite, 18 Fed. 331;
Trent v. Gulf Pacific Lines, 42 F. 2d 903;
The Superior, 22 Fed. 927;
The Idle Hour, 84 Fed. 356;
The Donna Lane, 299 Fed. 977;
Thorne v. White (1806), Fed. Case No. 13989;
Smith v. Treet (1845), Fed. Case No. 13117;
The Golden Sun, 30 Fed. Supp. 354.

(2) It appears that the provisions of Title 46, U. S. C. 701, are controlling upon the master of the vessel and the punishment of a seaman is limited thereby. While the Master has the inherent power to discharge a seaman,

the Courts have consistently held that a single act of disobedience, if trivial or unprovoked, will not justify discharge, unless of a very aggravated character.

The Almatia, D. C. Or. (1868), Fed. Case No. 254;

Hutchinson v. Coombs, Fed. Case No. 6955;

Nieto v. Clark, Fed. Case No. 10262;

The T. F. Oakes, 36 Fed. 445.

Courts of Admiralty have consistently held that seamen are the wards of such Courts and rules devised for the benefit of seamen shall be liberally construed.

Cortes v. Baltimore Insular Line, 287 U. S. 377.

The Court of Appeals for the 9th Circuit, as to the question of wrongful discharge, presented in this case, has decided important question of Federal law, which have not been but should be settled by this Court.

All of the cases relied upon by the 9th Circuit Court of Appeals in its holding that petitioners were discharged for good cause, are cases involving aggravation, important or lengthy delay of the sailing of the vessel, flagrant violations upon the part of the seaman or extensive absence from the vessel not amounting to desertion.

Wherefore it is respectfully submitted that this Petition for a Writ of Certiorari to review the Judgment of the U. S. Court of Appeals for the 9th Circuit should be granted.

Respectfully submitted,

DAVID A. FALL,
Attorney for Petitioners.

IN THE

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THE AMERICAN FISHING VESSEL "SAN FRANCISCO" and ANDREW ZAMBERLIN,

Respondents.

Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions of the Courts Below.

The opinion of the Court of Appeals has not been officially reported at the time this is written but is printed in the Record, Volume III, p. 3.

The opinion of the District Court has not been officially reported.

Specification of Errors.

The Court of Appeals for the 9th Circuit erred in making the following ruling:

> "Upon the facts found, we conclude, as did the District Court, that appellants were not wrongfully discharged, but were discharged for good cause."

THE ARGUMENT.

POINT 1.

The Court of Appeals for the 9th Circuit Wholly Misconceived the Law in Regard to Rightful Discharge, and Grievously Misapplied That Law to the Facts in This Case.

As we see it, the foremost error of the Circuit Court is basing its decision upon the following cases:

The Cripple Creek, D. C. E. D. Pa., 52 Fed. Supp. 710.

See, also,

Johnson v. Blanchard, D. C. S. D. N. Y., 7 Fed. 597;

Brink v. Lyons, D. C. S. D. N. Y., 18 Fed. 605;

The Nereid, D. C. Mass., 67 Fed. 602;

Buchanan v. United States, D. C. N. D. Cal., 24 F. 2d 528.

In the case of *The Cripple Creek, supra,* the facts were that the seamen, late in returning to the vessel, refused to come aboard unless the captain promised not to log them and would remain in the harbor to permit their difficulties to be compromised before the U. S. Shipping Commissioner. This would have required the vessel to remain in port another day. The vessel sailed without the seamen, and was held not liable for damages to the seamen which arose solely by reason of their own misconduct.

In *Johnson v. Blanchard, supra,* at 6:00 p. m. the libelant was permitted to go ashore for one hour. He knew that the vessel was expected to sail the following 4:00 a. m.

At 8:00 a. m., after the master had gone ashore and searched for him without avail, the vessel sailed.

In *Brink v. Lyons, supra,* the assistant engineer of a vessel, knowing that he was on the eve of departure, went ashore upon an errand but absented himself for an unreasonable period. The master, after spending two hours ashore searching for the seaman, and being unable to find him, departed on his voyage.

The Court below also cited *The Nereid,* D. C. Mass., 67 Fed. 602, in support of its holding. The vessel was ready to sail. Daley, the libelant, was given permission to go ashore with instructions to return at once. Various delays ensued and the vessel sailed although attempts were made to locate him by other members of the crew.

In *Buchanan v. United States,* D. C. N. D. Cal., 24 F. 2d 528, the libelants went ashore on the evening of December 24th, hoping they could delay the scheduled sailing at midnight. The vessel sailed on schedule and they were unable to rejoin the vessel until January 6th. On January 2nd the master had signed on new men to fill their positions. The Court held there was no obligation to keep their places open for an indefinite period of time.

As we read these five cases they have no application to the facts and circumstances in the case at bar. In three of them, the master either looked or sent someone ashore to look for the seamen.

The circumstances in the instant case are as follows: The master and the crew members of the D/S "San Francisco" went ashore to a cantina at Navidad Bay, Mexico, and returned at approximately 11:00 o'clock p. m.

[Vol. II, R. 11, 30, 133.] The shore was approximately 200 feet from the cantina and the vessel was within calling distance from the shore. [Vol. II, R. 11, 22, 176.]

The master and the fish boss knew that petitioners were remaining ashore and made no effort to call them aboard. [Vol. II, R. 135, 160, 161, 164.]

All of the crew of the D/S. "SAN FRANCISCO" except the watch were asleep or in their bunks when the petitioners returned. [Vol. II, R. 6, 11, 12, 33, 40, 49, 53, 54, 63, 90, 139, 140, 165.] As a practical matter it made no difference whether petitioners stayed ashore or stayed aboard that night.

The petitioners were at no time reprimanded for their remaining ashore that night at Navidad Bay. [Vol. II, R. 139, 169.]

There is no evidence in the record that the vessel was either delayed or that it sustained any loss or inconvenience, or any disruption in the harmony of discipline by reason of the petitioners' remaining ashore rather than sleeping aboard that night.

On the trip in question, the D/S "SAN FRANCISCO" returned with a full load of tuna. [Vol. II, R. 171, 172.]

A further misapplication of the five cases cited by the 9th Circuit in support of their decision is shown by the following cases which hold that a single act of disobedience, if trivial or unprovoked and unaggravated, will not justify a discharge:

The Almatia, D. C. Or. (1868), Fed. Case No. 254;

Hutchinson v. Coombs, Fed. Case No. 6955;

Nieto v. Clark, Fed. Case No. 10262;

The T. F. Oakes, 36 Fed. 445.

Discharge of the petitioners was not made until some 16 days after the particular trip in question had terminated. During this period of time the petitioners were allowed to believe by the master and his father that they would be called as soon as the vessel was ready for its next fish trip. [Vol. II, R. 92, 113, 114.]

The fact that a third member of the crew was discharged with petitioners, but later rehired, is strong evidence of the frivolity of the discharge. Apparently no reason was given for the discharge of this third member. [Vol. II, R. 65, 66.]

The decision of the 9th Circuit in this case permits the employer of a seaman to keep them standing by for a period of 16 days, and then belatedly discharge them for an isolated act of diseobedience that allegedly took place some 1½ months earlier. The seamen might have been able to obtain employment before April 22nd had they known they were to be discharged.

Certainly this is not in accord with the liberality with which Courts of Admiralty have traditionally interpreted the rules applicable to seamen. The latches of the master and fish boss in belatedly effecting a discharge, over two weeks after the completion of the voyage during which the alleged disobedience occurred, seems to be conclusive that such alleged disobedience was inconsequential and trivial. The record is clear that the alleged disobedience was singular and isolated.

As the Court said in *Johnson v. Blanchard,* 7 Fed. 597, the case relied upon by the 9th Circuit in support of its decision, in interpreting the latches of the seaman in instituting his action, "His latches creates a strong presumption against him, . . ." This case semes to be sub-

stantial authority in support of the position of petitioners herein and of no support to the decision of the Ninth Circuit. Had the conduct of petitioners warranted their discharge, such discharge would have been effected immediately upon return of the D/S "SAN FRANCISCO" to San Pedro, California.

The permitting of the discharge of seamen fishermen, employed for the fishing season, should not be predicated upon the whim of the master or for any reason less than is provided by 46 U. S. C. 701.

Justice Story in *Harden v. Gordon,* 2 Mason 451 Fed. Case No. 6047, recognized that fishermen employed upon a share basis are seamen. He further held, that as such, they are wards of Admiralty. Harsh construction permitting a discharge for the whim of the master would be contrary to the warning laid down by Justice Story. He stated "Every Court should watch with jealousy any encroachment upon the rights of seamen, . . . But Courts of maritime law have been in the constant habit of extending towards them a peculiar, protective favor and guardianship. They are emphatically, the wards of the Admiralty. . . ."

It cannot be said that Title 46, U. S. C. 701, is not remedial in the sense that it is a provision of the Merchant Marine Act which limits the punishment that may be inflicted for breaches by seamen of their duties and obligations.

The harsh penalty inflicted by the District and Circuit Courts in this case is in direct conflict with the rule of

Insert "A".

The taking back of the seamen herein, returning them to duty without criticism or condemnation, and the failure to log constitute a condonation, pardon and waiver on the part of the master. The law as reviewed and interpreted by Justice Story in The Mentor, Fed. Case No. 9427, is conclusive that a pardon by the master is a reinstatement of the right to wages. Full wages were paid petitioners herein until the termination of the specific trip during which the alleged misbehavior occurred.

Condonation, pardon and the indispensable duty to make an entry in the log book is reviewed in Cloutman vs. Tunison, Fed. Case No. 2907.

liberal construction of legislation enacted for the benefit and protection of seamen who are wards of Admiralty.

Cortes v. Baltimore Insular Line, 287 U. S. 377, 53 S. Ct. 173;

Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707.

Although some type of log was kept, it is important to note that no record was made in this log of petitioners' alleged misbehavior at Navidad. [Vol. II, R. 134, 135.]

Wrongful discharge should be prevented by the Courts, with just as much vigor and jealousy, as they do in permitting a seaman to rightfully separate himself from his vessel. The 9th Circuit in *Rogers v. Pacific Atlantic S. S. Co.,* 170 F. 2d 330, has expressed itself as to the extent it will go to prevent a seaman from separating himself from his vessel. Should not the standard be just as severe to justify a discharge?

We believe that the mandate of the following cases requires the holding that the discharge of the petitioners in the case at bar was wrongful:

Meyers v. Yosemite, 18 Fed. 331;
Trent v. Gulf Pacific Lines, 42 F. 2d 903;
The Superior, 22 Fed. 927;
The Idle Hour, 84 Fed. 356;
The Donna Lane, 299 Fed. 977;
Thorne v. White (1806), Fed. Case No. 13989;
Smith v. Treet (1845), Fed. Case No. 13117;
The Golden Sun, 30 Fed. Supp. 354.

Conclusion.

We respectfully submit that the decision of the 9th Court of Appeals in this case is in conflict with the decisions of the Federal Circuit and District Courts where this question has arisen, in conflict with the statutes controlling discipline of seamen, and that the uniformity of the Admiralty law and the certainty of its application is therefore seriously threatened; that the question presented in this Petition is of extreme importance in its wide application to seamen, and that the Writ of Certiorari should be granted in this case in order that the question presented herein may be clarified and settled by this Honorable Court.

Respectfully submitted,

DAVID A. FALL,
Attorney for Petitioners.

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Respondents.

Respondents' Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents, the American fishing vessel "SAN FRANCISCO" and Andrew Zamberlin, reply to certain portions of the "Petition" filed on behalf of the petitioners, Pete Fiamengo and Nick Marinkovich, in the following particulars, and in so doing will follow the outline of the "Petition":

Summary Statement of the Matter Involved.

In January, 1947, petitioners were employed by Andrew Zamberlin, then Master, and at all times managing owner and fish boss of the D/S "SAN FRANCISCO."

Sometime around the middle of March, 1947, while at Navidad Bay, Mexico, waiting for the weather to clear [Vol. II, R., p. 46; Vol. I., R., p. 29, Finding VII], a party of the fishermen from the D/S "SAN FRANCISCO" and another vessel, the "ST. JAMES," also anchored in Navidad Bay, went ashore early in the evening. The petitioners, Nick Zamberlin, the Master of the D/S "SAN FRANCISCO," and Andrew Zamberlin, the fish boss and managing owner of the D/S "SAN FRANCISCO" were among the party.

Prior to departure, Andrew Zamberlin and the Master of the "ST. JAMES" had a discussion in the presence of the petitioners as to when the party should return to the vessels [Vol. II, R., pp. 73, 142, 143]. The substance of the discussion was that they should remain two or three hours and all return together.

When the party reached shore, they entered a small open air or partially enclosed Cantina where they partook of refreshments. At about 11:00 P. M. the managing owner and fish boss, admittedly the person who gave all orders aboard the D/S "SAN FRANCISCO" [Vol. II, R., pp. 21, 85, 86, 123, 124, 140], and the Master of the "ST. JAMES," stated in a loud voice, "Let's go!" [Vol. II, R., pp. 75, 144, 145, 174]. The petitioners could not have failed to hear the command, and the Honorable District Court found that they did hear it [Vol. I, R., p. 31, Finding IX; Vol. II, R., pp. 123, 144, 145, 174]. The petitioners did not receive

permission from anyone to stay ashore [Vol. II, R., pp. 132, 133, 158; Vol. I, R., p. 31, Finding X].

The petitioners remained ashore without leave until about 5:00 A. M. the following morning.

The vessel proceeded to San Pedro, discharged its cargo and went into drydock for repairs. After the vessel was again ready to sail, the petitioners came back aboard and they were informed by the fish boss and managing owner with the consent of the Master, that they were discharged. No protest was made by the petitioners [Vol. II, R., pp. 66, 95] and although there is some question as to exactly what was said at the time of discharge there is no question that the petitioners and all other parties concerned were aware of the reason for discharge, to-wit, the absent without leave at Navidad Bay, for the very next day, April 23, 1947, the petitioners went to their Union and had the statement executed which is in evidence as Libelants' Exhibit "1," and which statement in its opening paragraph indicates their knowledge [Vol. I, R., p. 18].

Attention is called to the fact that the D/S "San Francisco" and the Master and owners of the vessel were, with respect to the petitioners, bound by a Union Agreement, Libelants' Exhibit "2" [Vol. I, R., p. 19, *et seq.*], and under said Agreement, to which both petitioners and respondent were bound, there is an express provision that there shall be no deductions, fines, or other punishment visited on the members of the crew, of which petitioners were members, save as provided in the Agreement [Libelants' Exhibit "2," Clause IV; Vol. I, R., p. 20]; such prohibition is expressed again in Clause VII of the Union Agreement. Upon examination of the Union Agreement,

it will be found that there is no provision anywhere therein which allows deductions, fines or *other punishment*, short of discharge, for disobedience while at sea or in a foreign port.

Replying to the Petitioners' "Reasons Relied Upon for the Allowance of the Writ."

The case of *Rogers v. Pacific-Atlantic S.S. Company*, 170 F. 2d 30, cited by petitioners as being in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in the instant case, is a case where a seaman left the ship and sued for wages to the end of the voyage, claiming he was justified in leaving the ship because of the conduct of the Master, and is in no respect a case involving discharge, and even by way of dicta is not in conflict with the Court of Appeals' decision in the instant case.

The other cases cited on page 5 by petitioners are in no way in conflict with the Court of Appeals for the Ninth Circuit's decision in the instant case. They merely apply the same rule of law to a different set of facts.

The petitioners rely heavily on Title 46, U. S. C. 701, but admit the inherent right of the Master to discharge a seaman, qualified by the rule laid down by the Courts that a discharge should not be for a single act of disobedience, if *trivial* or *unprovoked*, unless the act is of an *aggravated* nature. The cases cited by the Courts of Appeals for the Ninth Circuit in support of its decision in the instant case [Vol. III, R., p. 3] follow the same rule of law. Those cases also clearly set forth the rule of law that absence without leave is justification for discharge. The non-applicability of Section 701 and the aggravation of the single act of disobedience in the instant case be-

comes clearly apparent when it is noted that the vessel was a fishing vessel ready to sail with the weather, and that the Master and owners had no other way of punishing the petitioners for their disobedience [See Libelants' Exhibit "2," Vol. I, R., p. 20].

It is submitted that the questions here presented for review, in the words of former Chief Justice Hughes, ". . . turn upon the facts of the particular case, and there is no controversy of importance with respect to legal principals . . . and there is an utter absence of any good reason for asking our review." (American Bar Journal, Vol. XX, No. 6, p. 341.)

Respectfully submitted,

ARCH E. EKDALE and
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By ARCH E. EKDALE,
Attorneys for Respondents.